No. 78-779

In the Supreme Court of the United States

OCTOBER TERM, 1978

MITCHELL EDELSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The oral opinion of the district court (C.A. App. 5-11) is unreported. The opinion of the court of appeals (Pet. App. 1-7) is reported at 581 F.2d 1290. The opinion of the court of appeals denying rehearing (Pet. App. 8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1978. A petition for rehearing was

denied on October 13, 1978. The petition for a writ of certiorari was filed on November 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment sufficiently alleged that petitioner's false statements were material to the grand jury's investigation.

2. Whether prior to indictment petitioner was entitled to a copy of his grand jury testimony without demonstrating a particularized need for that testimony.

3. Whether petitioner demonstrated a compelling necessity for the disclosure of the grand jury proceedings.

4. Whether the government sufficiently established the materiality and falsity of petitioner's perjury.

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of making false declarations before a grand jury, in violation of 18 U.S.C. 1623.[1] Petitioner received a one-year sentence of imprisonment. In a *per curiam* opinion, the court of appeals affirmed (Pet. App. 1-7).

This case arises out of petitioner's testimony before a special grand jury investigating the interstate

[1] The indictment charged petitioner with making four false statements to the grand jury. The district court acquitted petitioner with regard to two of those false declarations. (C.A. App. 9-11).

transportation of stolen goods, stolen securities, and counterfeit currency in May 1975. At that time, petitioner, who was a practicing attorney in Chicago, denied having ever told Roger Camp that Vito Nicasio would not bring stolen goods and securities across state lines or having ever agreed with Camp to arrange a safe (non-bugged) place to exchange the stolen items (Pet. App. 5-6; C.A. App. 10-11; Gov't Exh. 2):

> Q. Did you ever tell Mr. Camp that Mr. Nicasio would be hesitant about bringing merchandise, securities, or any type of property whatsoever across state lines, or that he was not going to cross the state lines with the merchandise or property?
>
> A. I did not say such a thing to Mr. Camp.
>
> Q. Did you ever agree with Roger Camp to make arrangements for the exchange of said merchandise, whatever it may be, in a place outside your office that "would not and could not be bugged?"
>
> A. No, I did suggest a place outside my office. I suggested they go to the American National Bank.

However, the evidence at trial established that Camp, who was a government informant, had discussed with petitioner the very matters that petitioner had denied discussing in his grand jury testimony. In particular, the government introduced seven tape recorded conversations between Camp and petitioner (Pet. App. 1-2, 6; C.A. App. 7-11; Gov't Exhs. 3, 5-7,

3T1, 3T2, 5T, 6T1, 6T2, 7T1, 7T2). These recordings, which were corroborated by testimony from various government agents and informants including Camp (*e.g.*, Tr. 143-147, 213, 227-232, 263-281, 690-706, 1269-1274, 1283-1284), contained the following passages (Pet. App. 6):

> Edelson: "But he [Nicasio] is not coming to Chicago, I'll tell you that right now, he's not going to cross the state line with it. You have to go there. But I'm telling you right now there is no way in hell he's going to transport this stuff."
>
> * * * *
>
> Edelson: "He [Nicasio] is thinking over how he can handle it without taking the danger of doing anything in the mail or having anything on his person when he crosses the state line."
>
> * * * *
>
> Camp: "Well I assume that where we're going to do it is your office, right?"
>
> Edelson: "Probably not."
>
> Camp: "Probably not, okay. But I'm a little leery myself, I understand the nature of the merchandise, it's a little warm, but which doesn't constitute a problem but I want to be as cautious as the next guy, okay?"
>
> Edelson: "You want me to make sure that the arrangements are made, that the meeting takes place in a place that will not and cannot be bugged."
>
> Camp: "Yeah."
>
> Edelson: "Alright, that's simple. Good-bye."

ARGUMENT

1. Petitioner contends (Pet. 11-13) that the indictment upon which he was convicted insufficiently alleged the materiality of his perjury. But the indictment averred that petitioner's perjurious statements concerning his knowledge of the planned interstate shipment and transfer of stolen securities in the possession of Vito Nicasio were material "for the Grand Jury to determine whether [petitioner] had ever acted as a go-between for Roger Camp and Vito Nicasio in making arrangements for the sale of stolen securities or counterfeit United States currency" (Pet. App. 18). The indictment further stated that the grand jury before which petitioner falsely testified was investigating the transportation, sale, and receipt of stolen securities and counterfeit currency (Pet. App. 17).

Such specific and detailed allegations of materiality more than satisfy the minimal pleading requirements established long ago by this Court with regard to perjury indictments. See *Markham* v. *United States*, 160 U.S. 319, 324-325 (1895); accord, *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Sinclair* v. *United States*, 279 U.S. 263, 296-297 (1929); *United States* v. *Crippen*, 570 F.2d 535 (5th Cir. 1978), cert. denied, No. 78-538 (Jan. 8, 1979); *United States* v. *Crocker*, 568 F.2d 1049, 1056-1057 (3d Cir. 1977); *United States* v. *Davis*, 548 F.2d 840, 845

(9th Cir. 1977); *United States* v. *Bernstein*, 533 F.2d 775, 786 (2d Cir.), cert. denied, 429 U.S. 998 (1976); *United States* v. *Rook*, 424 F.2d 403, 405 (7th Cir.), cert. denied, 398 U.S. 966 (1970).[2] In sum, because this indictment enabled petitioner to prepare a defense to the specific charges while adequately protecting him from future prosecutions for the same offense, both courts below correctly rejected petitioner's argument on this point (Pet. App. 7). See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).

2. Petitioner further contends (Pet. 13-15) that he was automatically entitled to a copy of his grand jury testimony prior to his indictment. This claim is predicated solely on petitioner's verbal request (that he receive a transcript of the proceedings), made to the Assistant United States Attorney during petitioner's

[2] Petitioner notes (Pet. 11-13) that the Third Circuit may mandate more factual specificity in an indictment than is required by this Court and the other courts of appeals. See *United States* v. *Slawik*, 548 F.2d 75 (3d Cir. 1977); but see *United States* v. *Crocker*, *supra*. Review of this alleged conflict is unwarranted since, in any event, the indictment at issue here "set[s] forth the precise falsehood alleged and the factual basis of its falsity with sufficient clarity to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods." *United States* v. *Slawik*, *supra*, 548 F.2d at 83. As the court of appeals correctly concluded (Pet. App. 7), petitioner's false statements about the transportation and exchange of Nicasio's stolen securities certainly tended to impede the grand jury's investigation of those activities. See *United States* v. *Devitt*, 499 F.2d 135 (7th Cir. 1974).

testimony to the grand jury (Pet. 14).[3] But the courts of appeals have unanimously held that a witness who seeks a transcript of his own grand jury testimony prior to indictment must demonstrate with particularity a compelling necessity for the disclosure. See, *e.g.*, *United States* v. *Clavey*, 565 F.2d 111 (7th Cir. 1977), aff'd *en banc* by an equally divided court, 578 F.2d 1219 (1978), cert. denied, No. 78-120 (Nov. 6, 1978); *Bast* v. *United States*, 542 F.2d 893, 896 (4th Cir. 1976); *In re Bianchi*, 542 F.2d 98, 100 (1st Cir. 1976); *United States* v. *Fitch*, 472 F.2d 548, 549 n.6 (9th Cir.), cert. denied, 412 U.S. 954 (1973). See also *In re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973); Fed. R. Crim. P. 16(a)(1)(A) (disclosure of transcripts after indictment).[4] And petitioner's unsupported verbal request for his grand jury testimony fell far short of meeting that stringent standard. *E.g.*, *United States* v. *Clavey*, *supra* (failing memory and alleged desire to recant under 18 U.S.C. 1623(d)

[3] Petitioner was, of course, given a copy of his testimony after his indictment. Thus, the earlier rejection of his request did not affect petitioner's defense at trial. Moreover, petitioner never indicated in the five months between his testimony and his indictment that he sought to recant (see 18 U.S.C. 1623(d)), so that production of the transcript was not even arguably justified. See *United States* v. *Clavey*, 565 F.2d 111 (7th Cir. 1977), aff'd *en banc* by an equally divided court, 578 F.2d 1219 (1978), cert. denied, No. 78-120 (Nov. 6, 1978).

[4] Sound policy reasons, including protection of the grand jury process from coordinated perjury and protection of grand jury witnesses, support this rule. See *In re Bonanno*, 344 F.2d 830, 834 (2d Cir. 1965); *In re Grand Jury Witness Subpoenas*, 370 F. Supp. 1282, 1284 (S.D. Fla. 1974); *In re Alvarez*, 351 F. Supp. 1089 (S.D. Cal. 1972).

held insufficient to overcome presumption in favor of grand jury secrecy).[5]

3. Similarly, petitioner's contention (Pet. 24-29) that he was generally entitled to disclosure of the complete grand jury proceedings is without merit. As already indicated, the principle of grand jury secrecy is well-established, and grand jury testimony will be revealed only upon a showing of "compelling necessity," which "must be shown with particularity." *United States* v. *Procter & Gamble*, 356 U.S. 677, 682 (1958); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399-400 (1959). Whether such a showing has been made is a matter for the trial court's discretion, and the standard of review is whether that discretion has been abused. *United States* v. *Procter & Gamble, supra; Pittsburgh Plate Glass Co.* v. *United States, supra.* No abuse of discretion occurred here.

Although 18 months passed between petitioner's indictment and trial, petitioner did not move to inspect the grand jury minutes (or to interview the grand jurors) until the eve of trial. In light of the lengthy delays already incurred, the trial judge properly re-

[5] Nor was the government required to disclose to petitioner the existence of the taped conversations between petitioner and Camp prior to petitioner's testimony before the grand jury, as petitioner apparently claims (Pet. 30). *E.g.*, *United States* v. *Del Toro*, 513 F.2d 656, 664 (2d Cir. 1975); see *United States* v. *Mandujano*, 425 U.S. 564, 576-584 (1976). As both courts below concluded (Pet. App. 4-5), petitioner was not a target of the grand jury investigation and was not, in any event, entitled to any special warnings or disclosures (*ibid.*).

jected petitioner's last-minute attempt to further postpone his trial. More importantly, petitioner has never sufficiently specified what particular circumstances gave rise to a need for disclosure (see Pet. 28). Petitioner did not allege that he needed the grand jury proceedings to ensure accurate testimony from any particular witness. Compare *Dennis* v. *United States*, 384 U.S. 855, 870 (1966). Rather, petitioner has simply speculated that improper or insufficient evidence may have been presented to the grand jury or that the government may have acted improperly before the grand jury. Brief for Appellant (in the court of appeals) at 47-59. However, this Court has repeatedly stated that "an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence * * *." *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); see *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *Costello* v. *United States*, 350 U.S. 359, 363 (1956). And, as the court of appeals correctly concluded, petitioner's other vague, speculative, and unsubstantiated assertions do not constitute the necessary showing of particularized need (Pet. App. 2). See, *e.g.*, *Bast* v. *United States, supra; United States* v. *Bitter*, 374 F.2d 744, 748 (7th Cir. 1967).[6]

4. Petitioner also claims (Pet. 15-24) that his conviction was somehow unconstitutional because the

[6] In addition, the court of appeals noted that petitioner had made no specific request for *in camera* inspection of the grand jury minutes by the district court (Pet. App. 3).

only evidence establishing the materiality of his perjury was the transcript of his grand jury testimony and the testimony of the Assistant United States Attorney who conducted the grand jury proceedings. At the outset, we note that the issue of materiality is a question of law for the court to determine. *E.g.*, *Sinclair* v. *United States*, 279 U.S. 263, 298-299 (1929); *United States* v. *Damato*, 554 F.2d 1371, 1373 (5th Cir. 1977); *United States* v. *Percell*, 526 F.2d 189 (9th Cir. 1975). Here the materiality of petitioner's perjury was apparent from the face of the indictment. See point 1, *supra*. In addition, the Assistant United States Attorney who conducted the grand jury proceedings at which petitioner perjured himself testified fully concerning the grand jury's inquiries into the interstate transportation of stolen property and securities, and the materiality of petitioner's testimony thereto (Pet. App. 3, 7; Tr. 365-468).[7]

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[7] Contrary to petitioner's conclusory allegation, the Assistant United States Attorney was subject to extensive cross-examination. Petitioner's irrelevant and improper questions concerning the underlying facts supporting his facially valid indictment were properly cut off by the trial judge (Tr. 458-469). See *United States* v. *Calandra*, *supra*. In addition, the district court properly denied petitioner's last-minute request to interview the grand jurors and the court reporters as an obstructive fishing expedition. See *United States* v. *Roethe*, 418 F. Supp. 1118 (E.D. Wisc. 1976); *United States* v. *Wortman*, 26 F.R.D. 183, 193 (E.D. Ill. 1960). Thereafter, petitioner apparently did not attempt to subpoena the grand jury foreman or others as witnesses for his defense.

Finally, insofar as petitioner argues (see Pet. 16) that there was insufficient evidence of the falsity of his statements, that contention is also without merit. Petitioner testified before the grand jury that he had never told Camp, the government's informant, that Nicasio would not bring the stolen securities across state lines or that he (petitioner) would arrange a safe place for the exchange of the stolen goods. However, as Camp's testimony and the tapes of the conversations between Camp and petitioner demonstrated beyond a reasonable doubt, petitioner had discussed those very matters with Camp in detail (Pet. App. 5-7; C.A. App. 8-11; Gov't Exh. 2-7, 3T1, 3T2, 5T, 6T1, 6T2, 7T1, 7T2; Tr. 692-703). Thus, the courts below properly rejected petitioner's argument on this point, and their concurrent factual findings do not warrant further review by this Court. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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